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Office of Administrative Law Judges
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Issue Date: 09 April 2003

Case Nos.: 2000-ERA-00029, 2001-ERA-00017

In the Matter of

SHERRIE G. FARVER,
Complainant,

v.

THE LOCKHEED MARTIN CORPORATION,
LOCKHEED MARTIN ENERGY SYSTEMS, INC.,
Respondent

Appearances:

Edward H. Slavin, Jr., Esq.
For the Complainant

Robert M. Stivers, Jr., Esq.
For the Respondent

Before: JOSEPH E. KANE
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises out of a complaint of discrimination filed pursuant to Section 210 of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5851, *et seq*., hereinafter ERA. The implementing regulations are found at 29 C.F.R. Part 24. The ERA affords protection from employment discrimination to employees in the nuclear industry who commence, testify at, or participate in proceedings or other actions to carry out the purposes of the ERA or the Atomic Energy Act of 1954, as amended, 42 U.S.C. Section 2011, *et seq*. The law is designed to protect "whistleblower" employees from retaliatory or discriminatory actions by the employer. To succeed, the complainant must demonstrate that his or her protected activity was a contributing factor in the unfavorable personnel action. 42 U.S.C. § 5851(b)(3)(C); 29 C.F.R. § 24.7(b).

In nuclear whistleblower cases, the complainant has an initial burden of proof to make a prima facie case by showing (1) the complainant engaged in a protected activity; (2) the complainant was subjected to adverse action; and (3) the evidence is sufficient to raise a reasonable inference that the protected activity was a contributing factor in the adverse employment action. 42 U.S.C. §5851(b)(3)(A); 29 C.F.R. §24.5(b)(3). When the complaint reaches the hearing stage, the complainant must demonstrate, by a preponderance of the evidence, that she engaged in protected activity which was a contributing factor in the employer's alleged unfavorable personnel decision. 42 U.S.C. §5851(b)(3)(C); 29 C.F.R. §24.7(b); *see also Trimmer v. United States Department of Labor*, 174 F. 3d 1098, 1101-02 (10th Cir. 1999)(discussing distinct analytical model utilized under 42 U.S.C. §5851 (1992), as opposed to traditional burden-shifting framework established under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-05 (1973)). Only if the complainant meets her burden does the burden then shift to the employer to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior. 42 U.S.C. §5851(b)(3)(D); 29 C.F.R. §24.7(b).

The Findings of Fact and Conclusions of Law that follow are based upon my analysis of the entire record, arguments of the parties, and the applicable regulations, statutes, and case law. They also are based upon my observations of the demeanor of the witnesses who testified at the hearing. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. While the contents of certain evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformance with the standards of the regulations.

References to CX and RX refer to the exhibits of the complainant and respondent employer, respectively. The transcript of the hearing is cited as "Tr." and by page number.

I. STATEMENT OF THE CASE

Complainant contends that her "symphony" of internal and external complaints were met with retaliation in various forms, including a hostile work environment, work idling, denial of appropriate work, written warnings, and termination. (Complainant's Brief, p. 16, 40; Tr. 53).

It is Respondent's position that while protected activity took place and Complainant suffered adverse employment actions, no nexus between the two can be demonstrated. Rather, Respondent advances that Complainant was terminated because her security clearance was revoked per company practice. (Employer's Brief, p. 2). Employer submits that other alleged adverse employment actions suffered by Complainant either did not exist or were based upon non-retaliatory motives. (Employer's Brief, p. 5).

II. PROCEDURAL HISTORY

The complainant, Sherrie Farver, was employed by Lockheed Martin Energy Systems ("LMES"), Respondent, from October 12, 1987 until her termination on March 26, 1999. On April 15, 1999, Ms. Farver filed a complaint with the Department of Labor for punitive damages, affirmative action, and injunctive relief against LMES, alleging her termination was in retaliation for whistleblowing activities. On June 22, 2000, a Regional Supervisory Investigator from the Occupational Safety and Health Administration ("OSHA") determined that Farver had not been terminated for retaliatory reasons. Claimant then exercised her right of appeal.

On July 3, 2000, this matter was referred to the Office of Administrative Law Judges. I was assigned to the case on July 12, 2000. A Notice of Hearing and Preliminary Order was issued on July 14, 2000. On August 6, 2001, two complaints were consolidated into the instant case. After numerous pre-hearing motions, the United States Department of Energy ("DOE") and individual employees of DOE and LMES were dismissed from the case.

A formal hearing was held on the record from September 23 to September 26, 2002. The parties were provide an opportunity to present testimony, offer documentary evidence, and advance oral arguments. Post-hearing briefs and reply briefs were simultaneously submitted after the hearing.

III. ISSUES

1. Whether Complainant engaged in protected activity by reporting her concerns about the storage of PCB waste in her office building to various individuals and entities inside and outside of her employer?

2. Whether Complainant suffered adverse employment actions when Respondent issued Complainant a disciplinary letter on October 16, 1998 and terminated her on March 26, 1999?

3. Whether Complainant's protected activity was a contributing factor to the adverse employment action suffered by Complainant?

IV. CREDIBILITY FINDINGS

I have carefully considered and evaluated the rationality and internal consistency of the testimony of all witnesses, including the manner in which the testimony supports or detracts from the other record evidence. In so doing, I have taken into account all relevant, probative, and available evidence – analyzing and assessing its cumulative impact on the record. *See, e.g., Frady v. Tennessee Valley Auth.*, 92-ERA-19 at 4 (Sec'y Oct. 23, 1995)(citing *Dobrowolsky v. Califano*, 606 F.2d 403, 409-10 (3d Cir. 1979)); *Indiana Metal Prod. v. Nat'l Labor Relations Bd.*, 442 F.2d 46, 52 (7th Cir. 1971).

Credibility is that quality in a witness which renders his or her evidence worthy of belief. For evidence to be worthy of credit,

> [it] must not only proceed from a credible source, but must, in addition, be 'credible' in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe it.

Indiana Metal Prod., 442 F.2d at 51. An administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. *See Altemose Constr. Co. v. Nat'l Labor Relations Bd.*, 514 F.2d 8, 15 n.5 (3d Cir. 1975).

Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior and outward bearing of the witnesses from which impressions were garnered as to their demeanor. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and the demeanor of witnesses.

The transcript of the hearing in this case is 1,365 pages, comprised of the testimony of seven different witnesses: Charles Miner, James Barker, Sandra Lyles, Robert Hook, Sherrie Farver, Connie Polson, and Danny Rowan.

I found the testimony of James Barker, Sandra Lyles, Robert Hook, Connie Polson, and Danny Rowan to be credible. I found each witness to be forthright in their responses.

I also found the testimony of Charles Miner to be credible. Mr. Miner offered full, honest answers under examination. I note, however, that Mr. Miner's testimony came across, at times, severe or gruff. Despite occasional terseness, I indicated no indicia of dishonesty in his answers.

I found Ms. Farver to be generally credible, with some notable exceptions. From her testimony, it was evident that Ms. Farver believed her allegations. She expressed strong feelings about her previous employment and the treatment she perceived she received from Lockheed Martin Energy Systems. At times, however, Ms. Farver exhibited extreme emotional responses to otherwise mundane occurrences both through her behavior on the stand and her recounting of events relevant to the instant case. Accordingly, when appropriate, I grant less probative weight to Complainant's allegations of fact as contradicted by more credible, probative testimony.

V. FINDINGS OF FACT

I have thoroughly reviewed and considered the testimony and evidence presented at the formal hearing. At times, conflicting versions of events were offered by the witnesses. Considering my credibility findings announced above, I find the preponderance of the evidence establishes the following facts.

A. Complainant's Background

Complainant, Sherrie Farver, graduated from Clinton Senior High School in 1971. (Tr. 697). After graduating magna cum laude from Roan State Community College in 1986, she worked as a health physics technician for International Technology Corporation in Oak Ridge, Tennessee. *Id.* On October 12, 1987, Complainant was hired by Martin Marietta Energy Systems, which later became Lockheed Martin Energy Systems ("LMES").[1] (Tr. 698).

When Complainant first became qualified as a radiological control technician (RCT), she was working at the K-25 site. (Tr. 1165). Complainant last performed RCT work in 1991. (Tr. 1165-67; CX-67). Complainant testified that her physical restrictions prevented her from performing the strenuous work. (Tr. 1166).

B. Complainant's Transfer from K-25 to Y-12

Citing health concerns, Complainant requested to be transferred from the K-25 plant. (Tr. 423, 1025, 1169-72). In February 1996, Complainant was sent to work at the Mitchell Road and, then, Scarborough Road Central Staff sites. (Tr. 1172). Complainant worked at Central Staff for approximately nine months, but, during that time, Complainant realized that her assigned work was not commensurate with her skills. (Tr. 353, 402-03, 732, 1147, 1267-68).

In October 1996, Complainant was transferred to the Radiological Control Division of the Y-12 Plant at the Oak Ridge Nuclear Facilities. (Tr. 731-32). When she started at Y-12, Complainant was full time. (Tr. 1172). Because of her health, however, Complainant requested to switch to part-time work in April 1997. (Tr. 1173-74). At Y-12, Complainant always worked in an uncleared position in an uncleared area of LMES. (Tr. 736). Complainant testified that her clearance status was only an issue when she had to be escorted through a "cleared" area. (Tr. 736).

Complainant testified that she could not remember if anyone informed her of her job duties at Y-12; however, she said no one told her that her position would be that of a clerk. (Tr.

[1] LMES stipulates that Complainant was an employee. (Tr. 47).

348, 732). Dr. James Barker, current manager of radiological control for the subsequent contractor at the Y-12 site, however, alleged that Complainant was only a clerk in the training group. (Tr. 348).

Complainant wanted to perform training at Y-12. (Tr. 733-34). At that time, Sandy Lyles, Don Leonard, David Swenson, and Nelson Hearl were training. (Tr. 734). Sandy Lyles testified that radiological control technicians – Complainant's position title – were not performing training at Y-12. (Tr. 471). Lyles knew that Complainant wanted to train, but the absence of openings prevented her from training. (Tr. 475, 1013, 1016-17, 1021). Complainant never taught a training course after she was transferred to Y-12. (Tr. 730). In fact, Complainant last performed training in 1994. (Tr. 1168; CX-67).

When Complainant came to Y-12 from K-25, she had an "L" clearance. (Tr. 1223). The clearance gave her access to most of the facility; however, Complainant wanted her clearance raised to a "Q" clearance, and an application was started. (Tr. 1224, 1261). Complainant's clearance was suspended, however, in April 1997. (Tr. 1224-25). After the suspension, Complainant continued in her normal job with her regular pay. (Tr. 1225). She appealed the suspension, but her clearance was finally revoked in March 1999. (Tr. 1226). She knew of no way to appeal the revocation, and the only reason she ever received for the revocation was "security reasons." (Tr. 1226).

C. LMES's Job Offer to Complainant

In December 1997, Dr. James Barker initiated a formal review of Complainant's work to determine her correct job classification. (RX 11; Tr. 444-46). In an internal memorandum, Barker stated, "Ms. Farver was being compensated as an RCT but not performing RCT work, and I wanted to know if internal equity existed between Ms. Farver and other employees performing similar work." (RX 11). Prior to the review of Complainant's job, she had expressed conflicting opinions about her desire to participate in RCT training. *Id.*

Connie Polson, human resource specialist, performed the job evaluation on Complainant's position later that month. (Tr. 939, 1179). The evaluation was requested by Danny Rowan, and Polson determined that the job duties being performed and Complainant's job title did not match. (Tr. 939-40, 1031-32). Polson concluded that the duties performed by Complainant appeared to be "training assistant type work." (Tr. 943, 1048). During the job evaluation, Complainant was annoyed. Polson testified, "As soon as she greeted us she was very rude and abusive to us." (Tr. 944). Complainant used foul language toward Polson and her co-worker Dennis Baugh, compensation specialist, to such an extent that Baugh thought they should leave. (Tr. 944). During the evaluation, Complainant threatened to sue Polson and Baugh in her next lawsuit. (Tr. 986-88, 1179-80).

After equivocating on the issue earlier, Complainant expressed a desire to re-train as an RCT in February 1998, and she was allowed to do so, completing all requalification requirements for an RCT position on July 15, 1998. (1060-63). On July 23, 1998, Complainant met with Lyles, Polson, and Gwen Eagle (acting supervisor in place of Danny Rowan), and was offered a position as an RCT in Used Stores, monitoring the radiation levels of the supplies contained within a warehouse. (Tr. 347, 356, 817-18, 1038, 1180, 1186). She was also informed that she would have no more RCT training if she kept her present job. (Tr. 1186). When the offer was made, Complainant immediately expressed that she would be physically unable to perform the job. (Tr. 347, 818, 950-51). She was concerned about the lifting of instruments, squatting, and climbing entailed in the job. (Tr. 818, 980, 1181-83). She was also concerned about the temperature extremes within the warehouse and the effect of those extremes on her chronic fatigue syndrome and arthritis. (Tr. 819). Complainant told management that they were setting her up to fail, and she was so upset over the job offer that she broke down and cried during the meeting. (Tr. 820, 959).

Ultimately, Complainant did not accept the job offer, and she was kept in her current job. (Tr. 823-24, 1187). In an August 11, 1998 letter to Complainant, Dr. James Barker stated:

> Based on the July 28, 1998, review of your medical restrictions, your expressed doubts about your ability to perform the job duties of an RCT, and your request for part-time work, I have concluded you cannot perform the essential functions of such a position.
>
> You have been able to function in your current assignment as a part-time Senior Training Assistant; and based on our current needs and funding, I conclude that continuing that employment is the best alternative.
>
> This current assignment is not an accommodation related to your former position as an RCT. It is a job that exists on its own merit. Should your physical condition improve, you will be free to apply for an RCT position if one becomes available.

(CX-7A). Dr. Barker explained that Complainant was offered the job because her medical restrictions were self-imposed. (Tr. 360-61). The medical staff at LMES informed Barker that no medical test had been performed to substantiate Complainant's medical limitations. (Tr. 361). Only Complainant's personal allegations founded the limitations recorded in her record. (Tr. 361). Barker admitted the job was beyond Complainant's written limitations, but he stated, "And it was in light of [Complainant's self-imposed medical restrictions] that I was told that the appropriate thing to do when offering her the job was to present to her the job and its particulars [and] to take her to the location and determine whether she could perform it." (Tr. 361-62).

On September 4, 1998, Complainant responded with a lengthy, aggressive letter. (Tr. 364, 824-28). Complainant alleged that Dr. Barker's letter contained erroneous information and that her status as a whistleblower had garnered her "'special' and undesirable treatment." (CX-7B,

p. 3). Complainant stated, "I perceive your recent actions to me as retaliatory not only from a whistleblower's perspective but from the perspective of a known physically ill worker with known disabilities and known medical restrictions. How dare you!" *Id.* Citing her physical problems and status as a part-time worker, Complainant continued:

> Do your actions make sense to you Dr. Barker? Your actions make sense to me in that you set me up to refuse a job that I could not perform due to disabilities or to accept a job with all expectations of my failure to perform it.
>
> **Because I refused your job offer due to my physical disabilities, you have now plotted an employment course for me which will drastically demote my job level and significantly decrease my salary.** Surely, I don't have to tell you this is wrong, unfair, and unethical. Very possibly, I do need to tell you that your actions toward me are not only illegal, but unreasonable, unacceptable, and will not be tolerated.

(CX-7B, p. 3)(emphasis in original). Complainant cited federal regulations and her job qualifications, and she closed by stating:

> **I will reiterate that any demotion of job level and subsequent pay <u>decrease</u> is unacceptable, immoral, and contrary to both law and Lockheed Martin "values."** It is preferable that you and I come to an equitable agreement regarding my future job assignment; however, please be advised that I will pursue all legal avenues available to me if this is not possible. **I request that any future information related to my job assignment be communicated fully to me in writing.** Thank you kindly....

(CX-7B, p. 4)(emphasis in original). Attached to her letter was a list documenting the various individuals and groups she had copied on her letter to Dr. Barker. (CX-7B, p. 5). In addition to fellow employees Todd R. Butz, Lew Felton, Gus Gustavson, Robert Van Hook, JoEllen Meredith, Larry Pierce, Connie Polson, Danny Rowan, and Scott Wical, Complainant sent copies of her letter to the Coalition for a Healthy Environment, Larissa Brass of the *Oak Ridger*, the NBC news program *Dateline*, Don Dare of WATE news, Laura Frank and Susan Thomas of the *Tennessean*, Senator Bill Frist, lawyer John T. Harding, Suzanna Herron, lawyer Jacqueline Kittrell, lawyer David Lee, Frank Munger of the *Knoxville News Sentinel*, lawyer Edward Slavin, and Senator Fred Thompson. (CX-7B, p. 3; Tr. 830, 832). Complainant received no response to her letter. (Tr. 829).

On September 16, 1998, Barker responded to Complainant's allegations in an internal correspondence to various LMES officers, not including Complainant. (RX 11). Barker first addressed Complainant's work history under his supervision, providing that Complainant was assigned work at Y-12 in the training section of RADCON based on her medical restrictions. *Id.* Barker stated that Complainant's duties were "tracking and scheduling the training for RCTs.

There has not been any technical component to her work, and it does not require RCT qualification." *Id.* Barker noted that the company had determined to reduce its reliance on contract RCTs and convert these positions to LMES full-time employees. Barker stated, "Given this change in RCT usage, it seemed reasonable to offer a full-time RCT position to Ms. Farver. She had just requalified, and we were reducing contractors. The timing was a good fit." *Id.* Barker cited two other factors in the job offer decision. First, Complainant's suspended clearance required that the position be in the Property Protection Area of the Y-12 plant. Secondly, a position that allowed her to work in one location, Used Stores, and to perform the basic work without the need for climbing, confined space entry, heat stress evaluation, excessive walking, or respirator usage was viewed as the most likely to allow her to return to RCT work because of Complainant's lack of current RCT experience. *Id.*

At the formal hearing, Dr. Barker defended the job offer, stating, "I believe that I had, in fact, picked the simplest, least intrusive RCT job in the plant. There is nothing easier than that job." (Tr. 368). Barker further described it as a "reasonably stable, simple one-building, minimum movement job." (Tr. 373). Barker admitted that the Complainant's choice to stay in her current job would have had negative effects on her pay, but he stated, "[T]here was going to be a recognition that the company would not pay her an RCT salary for performing a clerical function." (Tr. 376).

D. Complainant Raises Concerns About Storage of PCB Waste

When Complainant arrived for work on Tuesday, October 14, 1998, several co-workers mentioned to her the presence of PCB waste containers near a women's restroom. (Tr. 736-37). Complainant went to investigate, finding approximately 33 B-25 boxes and two 55 gallon drums. (Tr. 737). She noticed labeling on the items listed the contents as PCB contaminated waste. (Tr. 737-38). Complainant saw no tape, ropes, chains, or stanchions marking a boundary around the waste. (Tr. 738-39). Complainant walked up to the containers and removed a label hanging in an attached sleeve to one of the boxes. (Tr. 739). Complainant recorded the contents of the label and placed the label back in its proper sleeve. *Id.*

Complainant reported her concerns to the building manager, Renfro Henderson. (Tr. 740). She also reported the waste to her division manager, Dr. Barker, and copied his boss, Todd Butz, on the matter. (Tr. 741). In addition, Complainant contacted the plant shift superintendent, the Environmental Protection Agency, the Tennessee Department of Environment and Conservation, and the Center for Disease Control. (Tr. 741; CX 36-A). Complainant's October 15, 1998 notification letter to the parties stated:

> Please accept this correspondence as a formal complaint regarding a situation that I became aware of and have personally observed on the afternoon of 10/14/98.

> Approximately thirty-four B-25 boxes, and two 55-gallon drums of PCB contaminated waste is being stored inside Y-12 Building 9709, east section. This facility houses office workers and training rooms where numerous personnel come for training. It is not a storage area for hazardous waste.
>
> This situation with the potential for damage to unknowing and unsuspecting workers is undesirable and possibly in violation of RCRA law. WHY WAS PCB WASTE MOVED INTO 9709 ON A WEEKEND WITHOUT THE BUILDING MANAGER'S PERMISSION? I would like this question answered. Why was this storage of PCB contaminated waste so urgent as to put office workers and students in harm's way? As a worker in 9709, I very much resent that I was not made aware of this questionable storage situation. I and others in this facility have a right to know and a right to safety regardless of the practices instituted by Lockheed Martin Energy Systems.
>
> Please correct this situation immediately, and please prevent an incident such as this from happening again. Health and safety should be paramount to operations instead of mere lip service.
>
> Sincerely,
> Sherrie Farver

(CX-36A, p. 1)(emphasis in original). Complainant testified, "[I]f this was a violation, I wanted it addressed and I wanted it addressed beyond LMES." (Tr. 742).

The next morning, a meeting was held between Complainant, Lyles, Eagle, and Jimmy Stone (a division manager from health and safety) to discuss the issue. (Tr. 742). During the meeting, Complainant was not given written information on the stored material; however, Jimmy Stone tried to reassure Complainant of her safety. (Tr. 753). While expressing her concern that the material was stored so closely to the ladies' restroom, Complainant revealed that she had touched a tag on the stored material. (Tr. 493, 753). Eagle, Lyles, and Stone then gathered their belongings and walked out into the hall, and Stone called for Charlie Miner. (Tr. 494, 754, 1191-92).

Complainant was confused and frustrated as to why the meeting had ended so abruptly, testifying that she kept saying, "What have I done?" (Tr. 754, 808-09). Regarding the meeting, Lyles testified,

> The entire purpose of bringing Mr. Stone in that day was to try to alleviate some of her concerns and that meeting [,] even trying to do that, did not go very well. Sherrie...became argumentative to Mr. Stone when he was trying to explain the postings and the regulations and the contents of the boxes.

(Tr. 498). Lyles added that Stone was not refusing to answer Complainant's questions. (Tr. 498). Lyles, Stone, and Eagle left the meeting because Complainant was argumentative and issues of label tampering had arisen. (Tr. 508-509). Lyles testified that "[a]t that point, any discussion was nonproductive." (Tr. 519).

Gwen Eagle eventually returned and handed Complainant a note with Gary Bean's name and phone number on it, instructing her to call Bean if she had any questions. (Tr. 755).

Complainant gathered her belongings and went outside for some air. (Tr. 755). As she was sitting, she made some notes of the meeting. (Tr. 759; CX-62). Complainant feared that she was being set up to be fired. She testified, "[W]hat was spinning through my head was...they've caught their fish and now they're ready to reel it in...." (Tr. 1192-93).

Soon after the abrupt ending to the meeting, Eagle, Lyles, Stone, Charlie Miner, and Janet Sexton drove up to Building 9709. (Tr. 74, 764, 1194). The group was going to investigate the potential tampering of container labels. (Tr. 73, 81-82). The group walked right past Complainant into the area with the stored PCB waste without acknowledging Complainant's presence. (Tr. 514, 1221-23). Shortly after they entered the building, Complainant followed them inside. (Tr. 767). She raised her coffee mug and loudly asked Jimmy Stone if she should be drinking coffee in the area. (Tr. 766-67). Complainant testified that she raised her mug to be seen and wanted to emphasize that she had not been trained about PCBs. (Tr. 767, 974). She admitted that she was "showboating." (Tr. 793). Miner interpreted her actions as aggressive, while Lyles testified that Complainant was "hysterical" during their investigation. (Tr. 111, 507). Complainant testified, "I wanted everybody in there to hear me." (Tr. 793). Next, Complainant walked over and looked at Charlie Miner's badge. (Tr. 75-76, 768-69). She did not know who he was, although she knew he was from labor relations. (Tr. 768-769).

Complainant attempted to show Miner where she had touched the label, but she was repeatedly told to return to her office by Eagle. (Tr. 773-74). At one point, Complainant took a step toward Eagle, and Eagle stepped back. (Tr. 774). Complainant thought Eagle was over-reacting. (Tr. 774). After several repeated commands to return to her office, Complainant returned to her office, but she intentionally took the long way back to her office so she could pass the area where she had removed the tag. (Tr. 774-75). After she pointed out the area to the group, Miner asked her if she had taken the label with her. (Tr. 775). Complainant told him that she had not. (Tr. 775). Meanwhile, Eagle continued to order Complainant to return to her office. (Tr. 129-30, 494-95, 775). After repeated requests, Complainant returned to her office. (Tr. 495).

The group did not find any evidence of label tampering; however, an issue had developed with Complainant's conduct. (Tr. 75, 77-78, 82-83, 109, 497-98). Miner stated that Complainant was out of control as she interrupted the investigation and refused to return to her office when directed. (Tr. 76-77, 88). Miner went to Complainant's office and informed her that they were

taking Complainant to the plant's medical offices to see Dr. Jones because of her aberrant behavior. (Tr. 173-74, 241, 764, 776-77). Complainant did not resist, and she spoke to Dr. Jones about the events of the day, her health concerns, and herself generally. (Tr. 780-81). Complainant was told to go home, but she had to wait for Sandy Lyles to pick her up. (Tr. 782). When Lyles arrived, she informed Complainant that she next needed to see Charlie Miner. (Tr. 783). Lyles, accompanied by Eagle, then took Complainant to a small conference room where Miner and Janet Sexton were waiting. (Tr. 783-84).

Miner first asked Complainant who she had reported the problems to, and Complainant told him all of the different entities she had copied on her concerns. (Tr. 784). Miner explained that he inquired about Complainant's reports to other groups to ensure that her concern had been communicated to the appropriate individuals responsible for correcting the problem, if one existed. (Tr. 229). Miner next addressed Complainant's conduct during their review, her insubordination, and her failure to follow the instructions of her supervisor. (Tr. 785). Complainant testified, "I complied with what I was being asked, but I didn't just do it immediately in [sic] the first time." (Tr. 785). Complainant responded to Miner by asking him if he had ever gotten upset on the job. (Tr. 786). Miner informed Complainant that she was not there to ask questions. Complainant testified that Miner's attitude and remarks made her felt like she was in prison. (Tr. 786-87). Mocking Miner, Complainant said, "You do not talk down to me. I will not sit here and be talked down...by you." (Tr. 787, 795). At that point, Miner felt like the situation had deteriorated and adjourned the meeting. (Tr. 242, 787).

After the meeting, Eagle and Lyles drove Complainant to her office, and Complainant proceeded home. (Tr. 788). One week later, Complainant saw Dr. Friedman and was returned to work. (Tr. 788-92).

On November 4, 1998, Lyles brought a letter of discipline to Complainant's office. (Tr. 792-93; CX-34). The "Written Reminder - Conduct" stated:

> On October 16, 1998, you interfered with a management review that was in progress at Building 9709. Your interference included, becoming disruptive to the point that you were given repeated direction by me and my supervisor to return to your office. You ignored the direction given you while continuing to be disruptive. Finally you returned to your work area. Subsequently, a meeting was held with you and Labor Relations to determine the reason for your misconduct. During this meeting you became disruptive once again and the meeting was terminated. Conduct such as this will not be tolerated.
>
> As a result of the above violation, you are being issued this Written Reminder. This action will remain active in your record for a period of nine months. Should you elect to continue to disregard company rules and my direction, you will be subject to more severe disciplinary action up to and including discharge.

> I hope that we will not have to discuss this matter in the future and that you will take the necessary action to correct your problem.

(CX-34). The letter was issued by Lyles; however, Charlie Miner actually authored the letter after discussions with Lyles. (Tr. 325, 544-45). Miner summarized the reason for Complainant's discipline as "failure to follow instructions from supervision." (Tr. 177, 1338). During the hearing, Complainant addressed the November 4, 1998 reprimand, testifying, "I probably should have had some kind of a written reminder. I don't know that I should have had step two." (Tr. 807).

E. Complainant's Removal From RCT Training

In October 1998, after the PCB incident, Complainant attended a RE/ACTS (radiation emergency accident training session). (Tr. 473, 1090). Before the training began, Lyles pulled Complainant from the training. (Tr. 473, 1091). Lyles informed Complainant that Mr. Barker had instructed her to tell Complainant to leave. (Tr. 428-30, 1091-92). Complainant subsequently spoke with Barker on the phone, and she testified that the conversation was heated. (Tr. 1092). Barker confirmed that he removed Complainant from the RCT training, testifying, "She had been offered the position of technician, said she could not perform it and after she indicated that she could not perform it, I elected not to continue to spend government money training her for a position she couldn't or wouldn't take." (Tr. 354, 442, 444; RX 11). Complainant testified that she told Barker, "I don't give a shit what you do at this point in time, but you had best get your ducks in a row and you better decide and stick with it what you're going to do with me." (Tr. 1093). Barker felt Complainant's behavior was insubordinate, obnoxious, taunting, and unpleasant. (Tr. 429). Although he was irritated, he did not take punitive action against her. (Tr. 430).

Complainant informed Barker that she was upset and that she wanted to take the rest of the day off as vacation. (Tr. 502, 1093). Barker refused her request for the vacation time, and he ordered her back to her work station. (Tr. 1093-94). Complainant then told Barker she was going home, and she gave him her phone number if he needed to reach her. Barker repeated his command for her to return to her work station, but she proceeded to go home. (Tr. 1095). When she got home, the phone rang and Barker again told Complainant to report to her work station. (Tr. 1096-97). Complainant proceeded to have a conversation with Barker, and she eventually returned to work. (Tr. 1097-98).

F. Complainant's Security Clearance Revocation and Subsequent Termination

On March 26, 1999, Complainant received a telephone call from her supervisor, Sandy Lyles, informing her of a meeting at the visitor's center at Y-12. (Tr. 699). Complainant was concerned about her job security; however, Lyles informed her that she was unaware of any plan to terminate Complainant. (Tr. 478). Lyles and Complainant met with Commie Bynum of the Department of Energy, and he informed Complainant that her security clearance had been finally

denied. (Tr. 699). Complainant had received notification of the denial approximately two weeks earlier in the mail. (Tr. 699-700). Mr. Bynum informed Complainant that it was up to LMES to determine her job status. (Tr. 700).

After her meeting with Mr. Bynum, Complainant and Lyles attended a meeting with Charlie Miner. (Tr. 702). Complainant told Miner that she wanted to meet with someone else, but he informed her that she was "stuck with him." (Tr. 289, 702-03; CX-56C). Complainant also requested that her attorney be present, but her request was denied. (Tr. 703). Miner informed Complainant that LMES was terminating her employment for security reasons. (Tr. 389, 478-79, 704, 706). She was not provided with documentation memorializing her termination at that time. (Tr. 707). When he informed her of her termination, Miner was not familiar with Complainant's employee record or performance appraisals. (Tr. 262-63, 291). Furthermore, Miner did not know the reason for Complainant's security clearance revocation. (Tr. 1282). Rather, Miner fired Complainant solely on the grounds of her security clearance revocation.

When Complainant heard the news, she took off her badge, licked it twice, and threw it hard onto the table in front of her in the direction of Miner. (Tr. 290, 309, 524, 526, 704; CX-56C). The badge bounced off the table and fell to the floor. (Tr. 705). Complainant testified that she wanted to spit on her badge, but could not because her mouth went dry. (Tr. 704). She said that licking the badge and throwing it was something she "owed" herself. (Tr. 704). After Complainant licked and threw her badge, Miner ended the meeting and called for the guards. (Tr. 310, 525, 705). As she was escorted out, Complainant requested her wallet, car keys, a basket, and a compact disc from her office. (Tr. 705-06).

After her termination meeting, Complainant was escorted to a vehicle with guards at the visitor control center at Y-12. (Tr. 707). The guards asked her where she was parked, and they drove her to her parking lot. (Tr. 707). The guards were carrying revolvers, and inside the vehicle were two M-16 rifles. (Tr. 708). Complainant remained in the vehicle for approximately one hour. (Tr. 708). Meanwhile, Lyles and Danny Rowan went to Complainant's office to retrieve her personal belongings. (Tr. 479, 1063-65). Lyles testified that she did not remember Complainant requesting only a few personal items. (Tr. 480-81, 491). Rather, Lyles testified that she remembered Miner telling her to gather Complainant's personal items and take them to her. (Tr. 481-82). Lyles estimated that it took them one hour to gather Complainant's personal effects. (Tr. 479). Lyles and Rowan drove up to the car, and they loaded Complainant's personal items into her car. (Tr. 709, 1066).

Complainant believed she was made a spectacle of because of her detention during a major shift change. (Tr. 710). Many employees arriving at work could see Complainant, the guards, and the objects being loaded into her car. (Tr. 710). Complainant testified that she "was being made an example of to others." (Tr. 711). Although Lyles and Rowan brought her many personal items from her office, Complainant never received her performance reviews, union literature, and training booklets from her office. (Tr. 714-16). Lyles later received an e-mail from Complainant

requesting personal items that were not previously delivered to her. (Tr. 483). Lyles proceeded to go through Complainant's office again. (Tr. 483). She prepared another box of personal items and sent the box to labor relations. (Tr. 483). All other items in Complainant's office were sent to a records center. (Tr. 483).

The ultimate decision maker regarding Complainant's termination was then-president Robert Van Hook. (Tr. 575). Mr. Van Hook stated that the sole reason for Complainant's termination was her security clearance revocation. "Our practice at that time had been anytime a person's clearance is revoked we terminate them." (Tr. 571). He testified that, although he did not specifically recall the details of his meeting with Miner, Miner never told him of Complainant's conduct during the label tampering investigation, nor was he specifically aware of Complainant's picketing of the plant. (Tr. 571, 574-75, 587-88, 663). Miner also testified that he did not highlight the discretion offered LMES in the written policy. (Tr. 257-58). Mr. Van Hook further explained the company's actions under cross-examination:

> Q: What were you told before you made the decision?
>
> A: That her clearance had been revoked. It was brought to my attention that she was a whistleblower and my question was, are we being consistent with her as we would with any other employee if their clearance is revoked, and the answer I got back was yes, and I said, follow your procedure.
> ....
>
> A: Our past policy had always been that because of the nature of the work that goes on at Y-12, the fact that it is national security work, if a clearance has been revoked we terminate the person.

(Tr. 575, 642). Mr. Van Hook never reviewed the written procedure or any other documents before he authorized the termination of Complainant. (Tr. 575). The company procedure provides the following guidance to the site manager:

> D. Actions Following a Final DOE Clearance Determination
> ...
>
> 5. If the DOE revokes the employee's clearance, [the site manager] assures that the employee is removed from the payroll or determines that it is appropriate to continue his/her employment in an uncleared position.

(CX-14, p. 4).

Miner's testimony corroborated Van Hook's testimony. Miner stated, "[T]he practice that Y-12 has used for many years, and the practice has been clear that employees who have their

clearance revoked are removed from the payroll." (Tr. 145). Miner added that he did not recall management ever exercising the discretion provided under the policy to retain workers whose clearances have been revoked. (Tr. 148). He stated, "The company made the decision that individuals who are not capable of maintaining or gaining a security clearance was [sic] not the type [of] employees that we wanted to be under our employment." (Tr. 260).

VI. CONCLUSIONS OF LAW

The employee protection provision of the ERA, 42 U.S.C. §§ 5851, was amended by Congress in 1992 "to include a burden-shifting framework distinct from Title VII employment discrimination burden-shifting framework first established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-805 (1973)." *See Trimmer v. United States Department of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999); *Stone & Webster Engineering, Corp. v. Herman*, 115 F. 3d 1568, 1572 (11th Cir. 1997). Under the ERA, during the investigative process, a complainant is required to establish a prima facie case that raises a reasonable inference that his or her protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint. 42 U.S.C. §5851 (b)(3)(A). However, even if the employee establishes a prima facie case, the Secretary cannot investigate the complaint if the employer can prove by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the employee's behavior. 42 U.S.C. §5851 (b)(3)(B). Thus, only if the employee establishes a prima facie case and the employer fails to disprove the allegation of discrimination by clear and convincing evidence may the Secretary even investigate the complaint.

Once a case has been tried fully on the merits, it no longer serves any analytical purpose to address and resolve the question of whether the complainant presented a prima facie case. Instead, the relevant inquiry is whether the complainant prevailed by a preponderance of the evidence on the ultimate question of liability. *Trimmer*, 174 F.3d at 1101-1102. Thus, it must be determined whether Complainant has proven, by a preponderance of the evidence, that she engaged in protected activity under the Act, that LMES took adverse action against her, and that Complainant's protected activity was a contributing factor in the adverse action that was taken. 42 U.S.C. §5851(b)(3)(C).

In *Marano v. Department of Justice*, 2 F.3d 1137 (Fed. Cir. 1993), interpreting the Whistleblower Protection Act, 5 U.S.C. §§ 1221(e)(1), the Court observed:

> The words "a contributing factor" . . . mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a "significant," "motivating," "substantial," or "predominant" factor in a personnel action in order to overturn that action.

Marano, 2 F.3d at 1140 (citations omitted).

Only if complainant meets her burden by a preponderance of the evidence does the burden shift to the employer to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the employee's behavior. 42 U.S.C. §5851(b)(3)(D) *Trimmer*, 174 F.3d at 1102. Although there is no precise definition of "clear and convincing," the Secretary and the courts recognize that this evidentiary standard is a higher burden than preponderance of the evidence but less than beyond a reasonable doubt. *See Yule v. Burns Int'l Security Service*, Case No. 1993-ERA-12 (Sec'y May 24, 1995).

Initially, I note that my jurisdiction is limited by law in this case to deciding only whether the Complainant was discriminated against because she engaged in protected activity under the applicable protection statutes. I am limited to deciding only this issue and cannot consider whether the employer acted properly in making decisions unrelated to the Complainant's protected activity. Likewise, I do not have the authority to decide whether the Complainant's supervisors acted improperly unless those actions were related to the protected activity under the applicable statutes. My inquiry must focus solely on whether the Complainant's protected activity was the reason for the adverse actions taken by Respondent.

A. *Protected Activity*

I am guided by secretarial decisions on what action constitutes a protected activity under similar whistle blowing statutes. Under environmental protection statutes, the Secretary has broadly defined a protected activity as a report of an act which the complainant reasonably believes is a violation of the environmental acts. While it does not matter whether the allegation is ultimately substantiated, the complaint must be "grounded in conditions constituting reasonably perceived violations of the environmental acts." *Minard v. Nerco Delamar Co.*, 92-SWD-1 (Sec'y Jan. 25, 1995), slip op. at 8. In the *Minard* case, the Secretary indicated the complainant must have a reasonable belief that the substance is hazardous and regulated under an environmental law. Consequently, the complainant's concern must at least "touch on" the environment. *Nathaniel v Westinghouse Hanford Co.*, 91- SWD-2 (Sec'y Feb. 1, 1995), slip op. at 8-9; *Dodd v. Polysar Latex*, 88-SWD-4 (Sec'y Sept. 22, 1994). If a complainant had a reasonable belief that the Respondent was in violation of an environmental act, that he or she may have other motives for engaging in protected activity is irrelevant. The Secretary concluded that if a complainant is engaged in protected activity which "also furthers an employee[']s own selfish agenda, so be it." *Carter v. Electrical District No. 2 of Pinal County*, 92-TSC-11 (Sec'y July 26, 1995) (some evidence indicated that Complainant's motives were to retaliate because of a wage dispute with a new manager).

To constitute protected activity, an employee's acts must implicate safety definitively and specifically. *American Nuclear Resources v. U.S. Department of Labor*, 134 F.3d 1292 (6th Cir. 1998). The whistleblower statutes do not protect every incidental or superficial suggestion that somehow, in some way, may possibly implicate a safety concern. *Stone & Webster Engineering Corp. v. Herman*, 115 F.3d 1568, 1574 (11th Cir. 1997). Raising particular, repeated concerns

about safety issues that rise to the level of a complaint constitutes protected activity. *Bechtel Construction Co. v. Secy. of Labor*, 50 F.3d 926, 931 (11th Cir. 1995). Making general inquiries regarding safety issues, however, does not automatically qualify as protected activity. *Id*. Where the Complainant's complaint to management "touched on" subjects regulated by the pertinent statutes, the complaint constitutes protected activity. *See Nathaniel v. Westinghouse Hanford Co.*, 91-SWD-2 (Sec'y Feb. 1, 1995), slip op. at 8-9.

The Secretary of Labor has consistently held that an employee who makes internal safety complaints is protected under the whistleblower provisions of the applicable environmental statutes. *Goldstein v. Ebasco Constructors Inc.*, Case No. 86-ERA-36 (Sec'y Dec. and Order April 7, 1992), *rev'd sub. nom,. Ebasco Contractors, Inc. v. Martin*, No. 92-4576 (5th Cir. Feb. 16, 1993)(per curiam); *Willy v. The Coastal Corporation*, Case No. 85-CAA-1 (Sec'y Dec. and Order June 4, 1987); *Mackowiak v. University Nuclear Systems, Inc.*, Case No. 82-ERA-8 (Sec'y Dec. and Order April 29, 1983). Reporting safety and environmental concerns under CERCLA internally to one's employer is protected activity. *Dodd v. Polysar Latex*, 88-SWD-4 (Sec'y Sept. 22, 1994); *see also Helmstetter v. Pacific Gas & Electric Co.*, 91-TSC-1 (Sec'y Jan. 13, 1993) (addressing internal complaints under TSC complaint); *Hermanson v. Morrison Knudsen Corp.*, 94-CER-2 (ARB June 28, 1996)(addressing internal complaints under CERCLA). According to the Secretary, an internal complaint should be a protected activity because the employee has taken his or her concern first to the employer to permit a chance for the violation to be corrected without government intervention. *Poulos v. Ambassador Fuel Oil Co., Inc.*, 86-CAA-1 (Sec'y Apr. 27, 1987)(order of remand). The report may be made to a supervisor, through an internal complaint or quality control system, or to an environmental staff member. *Williams v TIW Fabrication & Machining, Inc.*, 88-SWD-3 (Sec'y June 24, 1992); *Bassett v. Niagara Mohawk Power Corp.*, 85-ERA-34 (Sec'y Sept. 28, 1993); and, *Helmstetter v. Pacific Gas & Electric Co.*, 91-TSC-1 (Sec'y Jan. 13, 1993).

There is no debate that Ms. Farver engaged in protected activity throughout the course of her employment with LMES. In her "Prehearing Statement," Complainant lists the following protected activities:

1. Reporting improper disposal of PCB-contaminated waste;
2. Filing two health hazard evaluation requests to NIOSH;
3. Raising environmental health issues in her FTCA lawsuit against the Department of Energy;
4. Testifying before Judge Kerr in *Cox v. LMES*;
5. Filing DOL OSHA whistleblower complaints;
6. Writing letters to and providing testimony before the Department of Energy, Department of Labor, and Tennessee State Legislature;
7. Assisting employees in proceedings;
8. Participating in University of Alabama interviews; and
9. Expressing concerns to the Governor's Blue Ribbon Panel on Oak Ridge pollution

During the hearing, Complainant referenced other incidents of protected activity as examples of LMES's notice of Complainant's protected activity. (Tr. 21-25; CX-18-26, 29, 30, 41, 42).

The bulk of the testimony at the hearing centered around Complainant's concerns about the placement of PCB-contaminated waste in the building in which she worked. Complainant memorialized her concerns in her October 15, 1998 e-mail, and expressed her concerns to management the next day. (CX-36-A, p. 1). Complainant's e-mail is clearly the report of an internal complainant and, as such, is protected activity. The letter specifically and definitively identifies her safety and health concerns. Furthermore, Complainant's discussions with management are also protected activity, as protected activity can be informal.

It is not necessary to engage in a lengthy analysis of Complainant's other protected activity. After considering the testimony and post-hearing submissions of the parties, it is clear that the remaining protected activity merely "sets the scene." Complainant expended little energy at the hearing to specifically discuss Complainant's multitude of prior activity, stating that protected activity in the past was briefly mentioned only to show notice on the part of LMES and not to draw a specific line from any one example of protected activity to her termination. (Tr. 21-25). Rather, Complainant advances a theory that Complainant's cumulative protected activity over the years and concomitant known status as a "whistleblower" precipitated her retaliatory termination from LMES. It can be confidently said that Complainant has engaged in various protected activity throughout her career at LMES, and LMES management throughout the trial admitted knowledge of much, but not all, of the activity. Of the incidents listed in Complainant's pre-hearing submission, much of it would also be protected activity, although I find that Complainant has not provided enough specific proof regarding her "assisting employees in proceedings" and "participating in University of Alabama interviews" for me to determine whether or not she engaged in protected activity in those instances. The remaining items on the list – filing two health hazard evaluation requests to NIOSH, raising environmental health issues in her FTCA lawsuit against the Department of Energy, testifying before Judge Kerr in *Cox v. LMES*, filing DOL OSHA whistleblower complaints, and writing letters to and providing testimony before the Department of Energy, Department of Labor, and Tennessee State Legislature – are protected activity.

B. *Adverse Employment Action*

To constitute an adverse action, Complainant must demonstrate by a preponderance of the evidence that the action had some adverse impact on her employment. *See Trimmer*, 174 F.3d at 1103 (citing *Montandon v. Farmland Indus., Inc.*, 116 F.3d 355, 359 (8th Cir. 1997)); *but see DeFord v. Secretary of Labor*, 700 F.2d 281, 287 (6th Cir. 1983))(economic loss is not required for action to be adverse). The governing regulations define discrimination or an adverse employment action very broadly. *See* 29 C.F.R. 24.2(b)("Any employer is deemed to have violated the particular federal law and the regulations in this part if such employer intimidates, threatens, restrains, coerces, blacklists, discharges, *or in any other manner discriminates against any*

employee because the employee has [engaged in protected activity]"). Activities found to be adverse employment actions include, but are not limited to, elimination of position, threats of termination, blacklisting, causing embarrassment and humiliation, constructive discharge, and issuance of disciplinary letters.

Throughout the course of the instant litigation, Complainant has not alleged a consistent number of retaliatory acts. In Ms. Farver's complaint, she references all prior adverse employment actions as explored in previous whistleblower claims, in addition to her written reprimand and termination. In Complainant's pre-hearing statement, she lists the following adverse employment actions: termination, hostile work environment, denial of appropriate training, intimidation, harassment, blacklisting, referral to company psychologist, false arrest, and false imprisonment. In Complainant's Closing Brief, however, she lists only her termination, written reprimand, denial of suitable job duties, and hostile work environment. (Complainant's Closing Brief, p. 40). Further still, at the hearing, Complainant explained that relief was only sought for her termination as previous adverse employment actions has been pursued in previous claims and been finally denied. (Tr. 21-25). In that light, Complainant advanced that the examples of adverse employment action, while possibly not actionable, were indicative of a "common scheme or plan based upon the totality of the protected activity" to retaliate against Complainant. (Tr. 1126).

Review of the procedural history of the instant case and former complaints filed by Ms. Farver reveal that a majority of Complainant's alleged adverse employment actions have already been determined to be non-retaliatory in nature. Complainant filed another whistleblower complaint prior to the instant claim on October 20, 1998. (RX 2). In the complaint, Complainant alleged a hostile work environment including demotion outside the ordinary course of business, denial of training, denial of leave time, failure to reasonably accommodate by placing Complainant in an inappropriate job in a warehouse, refusing to answers questions about Complainant's concerns over the placement of PCB-contaminated waste in her work building, hostile cross-examination about Complainant's communication of her concerns to outside entities, and retaliatory referral to a psychiatrist. Attached to the complaint were fifteen pages of supplemental material, including a chronology of events and various other work documents. On March 11, 1999, Regional Supervisory Investigator Arthur M. Johannes issued findings on Ms. Farver's complaint. Mr. Johannes found no adverse employment action, and Complainant did not appeal the findings. Thus, the findings became a final Order of the Secretary of Labor. 29 C.F.R. §24.4(d)(2).

In *Montana v. United States*, the Supreme Court stated: "[u]nder collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits . . . ." 440 U.S. 147, 153 (1979). The Court went on to state that precluding parties from contesting issues they have already had a full and fair opportunity to litigate "protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Id.* at 153-54.

The doctrine of collateral estoppel operates when three requirements are met: (1) the issue in the current action and the prior action are identical; (2) the issue was actually litigated; and (3) the issue was necessary and essential to the judgment on the merits. *U.S. v. Beaty*, 245 F.3d 617, 623-24 (6th Cir. 2001). In the instant case, Ms. Farver's complaints concerning hostile work environment including demotion outside the ordinary course of business, denial of training, denial of leave time, failure to reasonably accommodate by placing Complainant in an inappropriate job in a warehouse, refusing to answers questions about Complainant's concerns over the placement of PCB-contaminated waste in her work building, hostile cross-examination about Complainant's communication of her concerns to outside entities, and retaliatory referral to a psychiatrist are barred by the doctrine of collateral estoppel. Those complaints are identical to Complainant's prior suit, and they have been finally determined. Complainant cannot bootstrap her former allegations to the instant case. While Complainant is entitled to present her entire history of protected activity, she cannot claim certain conduct of LMES was retaliatory after it has been adjudicated to the contrary and not appealed.

Complainant's only new allegations of adverse employment action are her written reprimand and termination. I shall address each separately.

1. Written Reprimand

Even though a disciplinary letter does not result in a firing or demotion of a complainant, such drastic action is not required to render such a letter an adverse employment action. *See, e.g., Self v. Carolina Freight Carriers Corp.*, 89-STA-9 (Sec'y Jan. 12, 1990), slip op. at 15 (warning letters that "served to progress [the c]omplainant toward suspension and discharge" adversely affected him even though the letters did not result in suspension or discharge); *Helmstetter v. Pacific Gas & Electric Co.*, 86-SWD-2 (Sec'y Sept. 9, 1992).

The written reprimand makes clear that Complainant's conduct during management's review of the stored PCB waste was unacceptable, and, more importantly, it promises more severe punishment, including suspension, in the future if Complainant engaged again in similar conduct. I find the letter clearly lit the path toward suspension or other disciplinary measures as it was specific concerning the undesirable behavior and stated that the reprimand would stay in Complainant's file for nine months. In a sense, the letter reads as a probationary letter, hanging over Complainant's head for the next nine months and ensuring more appropriate conduct. As the reprimand provides tangible job consequences, I find the November 4, 1998 reprimand letter was an adverse employment action.

2. Termination

Termination is the quintessential adverse employment action. *See, e.g.,* 29 C.F.R. §24.2(b). Accordingly, I find Complainant's termination was an adverse employment action.

C. *Protected Activity as a Contributing Factor in Adverse Employment Action*

Like most cases of discrimination or retaliation, the instant case lacks a "smoking gun." *See Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 48 (3d Cir. 1989). The complainant need not have any specific knowledge that the respondent's officials had an intent to discriminate against the complainant, however; ERA employee protection cases may be based on circumstantial evidence of discriminatory intent. *See Frady v. Tennessee Valley Authority*, 92-ERA-19 and 34, slip op. at 10 n. 7 (Sec'y Oct. 23, 1995); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984)(quoting *Ellis Fischel State Cancer Hospital v. Marshall*, 629 F.2d 563, 566 (8th Cir. 1980)).

In *Timmons v. Mattingly Testing Services*, 95- ERA-40 (ARB June 21, 1996), the Board reviewed principles governing the evaluation of evidence of retaliatory intent in ERA whistleblower cases. The Board indicated that where a complainant's allegations of retaliatory intent are founded on circumstantial evidence, the fact finder must carefully evaluate all evidence pertaining to the mind set of the employer and its agents regarding the protected activity and the adverse action taken. The Board noted that there will seldom be "eyewitness" testimony concerning an employer's mental process. Fair adjudication of whistleblower complaints requires "full presentation of a broad range of evidence that may prove, or disprove, retaliatory animus and its contribution to the adverse action taken." *Id.* at 5.

The Complainant has proven, by a preponderance of the evidence, that she engaged in protected activity under the Act and that LMES took adverse action against her. As Complainant has established the first two factual predicates, at question here is Complainant's proof of the final factual predicate of her case: Complainant's protected activity was a contributing factor to the adverse employment actions that she suffered. 42 U.S.C. §5851(b)(3)(C).

1. Written Reprimand

Complainant presented three pieces of circumstantial evidence to demonstrate a nexus between her protected activity and the written reprimand: 1) Jimmy Stone expressed concern over Complainant's effort to report the PBC problem to local newspapers; 2) Miner questioned Complainant about the entities she reported the problem to; and 3) LMES management knew of another whistleblower suit she filed before she received her written reprimand.

First, Complainant points to Miner's admission that Jimmy Stone reported to Miner that Complainant was threatening to go to the newspapers as evidence of LMES's concern over Complainant's protected activity. (Tr. 116-21). Upon review of Miner's testimony, however, I find it more likely that Stone was merely reiterating to Miner what Complainant had said, rather than engaging in a nefarious plot to prevent her from engaging in or punish her for her protected activity.

Secondly, I find that Miner adequately and completely explained the reason for his questioning about Complainant's communications with other groups: to ensure that the proper parties had been contacted to research the potential problem.

Complainant also intimates that her written reprimand was retaliation for a prior whistle-blower complaint filed in October 1998. (Tr. 803). Beyond alleging that the company knew of the suit, however, Complainant provides no other connection between her filing of the suit and her letter of reprimand. While temporal proximity alone can raise a reasonable inference of discrimination sufficient to demonstrate a prima facie case of discrimination, it alone does not establish discrimination by a preponderance of the evidence. *Jackson v. Ketchikan Pulp Co.*, 93-WPC-7 and 8 (Sec'y Mar. 4, 1996).

Beyond the existence of a reasonable rationale to inquire about the parties contacted by Complainant, I find that Complainant's conduct during management's review is compelling, probative evidence that the written reprimand was not retaliatory. The testimony from several witnesses to the incident, including Complainant, is fairly uniform. While there exists disagreement over the volume of Complainant's voice as she drew attention to herself during management's review of the site, several facts are undisputed: 1) Complainant was not invited to participate in the review; 2) Complainant "took over" the meeting by demanding attention through a raised voice and exaggerated hand motions; and 3) Complainant refused to obey multiple instructions to return to her office. Complainant admitted under oath she was "show-boating." Considering the evidence of the incident, the written reprimand seems wholly appropriate. Complainant herself admitted that she deserved to be disciplined over her actions.

Thus, given the paucity of convincing, probative evidence from Complainant and the utterly reasonable actions by management, I find the preponderance of the evidence does not establish that any of Complainant's protected activity contributed to her receipt of the written reprimand. Rather, the evidence demonstrates the sole factor in her receipt of the reprimand was her inappropriate behavior on October 16, 1998, during a management meeting.

2. Termination

Complainant argues that it was retaliatory for LMES to not exercise the discretion in LMES's policy LR-107, D. The company procedure provides the following guidance to the site manager:

> D. Actions Following a Final DOE Clearance Determination
> ...
> 5. If the DOE revokes the employee's clearance, [the site manager] assures that the employee is removed from the payroll *or* determines that it is appropriate to continue his/her employment in an uncleared position.

(CX-14, p. 4)(emphasis added).

Complainant alleges that Miner's failure to inform or remind Mr. Van Hook of the discretion in the policy to retain Complainant is circumstantial evidence of retaliation. (Complainant's Closing Brief, p. 29-30; Complainant's Rebuttal Brief, p. 11). I find this argument unpersuasive. First, it is not clear that Miner's responsibility required him to notify a superior of company regulations. One would assume a superior would have an understanding of the requirements of company regulations. Furthermore, whether Miner instructed Van Hook on the "discretion" of the policy is really immaterial. No evidence exists that Miner coerced Van Hook into firing Complainant. The ultimate decision was Van Hook's to make, and he made it. There is absolutely no evidence of retaliatory motive on the part of Van Hook in his decision to terminate Complainant. Mr. Van Hook's testimony credibly demonstrates that he ensured Complainant's termination was uniform with previous, similar situations. In addition, Van Hook did not review Complainant's personnel record - a fact supporting the allegation that Complainant's termination was solely based upon her clearance revocation.

Complainant also argues that LMES often employed individuals after their clearances had been revoked, and, in that vein, Complainant requested information on previous employees with revoked security clearances during the discovery phase of the instant case.[2] To support its argument that post-revocation employment was provided, Complainant presented the affidavit of Harry L. Williams. (CX-52). In his declaration, Mr. Williams states, "Respondent LMES' policies in effect at the time required LMES to try to find a job for employees, like Ms. Farver, after losing their clearances." I grant the statement little weight as it is patently wrong. Whatever Mr. Williams's impression of the written policy at that time, the policy clearly does not require that LMES first search for suitable, alternative employment for Complainant. Rather, the written policy offers LMES a clear choice: fire the employee *or* locate suitable, alternative employment, if available. One of the alternatives need not supercede the other. Beyond simply being wrong, Mr. Williams's declaration suffers from sheer generalities. As probative evidence of a policy or

[2] Complainant asserts that Respondent has not complied with court-ordered discovery, and, thus, a negative inference is appropriate that finds that Complainant is the only LMES employee to be fired after the revocation of her security clearance. I do not find such an inference appropriate. On July 22, 2002, Complainant requested the identity and various other information on all 54 LMES employees, previously identified in Mr. Miner's affidavit, that were terminated after they lost their security clearances. A discovery dispute ensued, and on September 9, 2002, I ordered certain aspects of Complainant's Interrogatory/Request for Production #4 answered or produced. On September 16, 2002, the Court received a copy of LMES's response to the ordered discovery. I find LMES's response adequate and reasonable. Complainant was provided a list of Y-12 terminations via revoked clearances from 1989 to 1999, including the employees' names, payroll status, and date of termination. Furthermore, Respondent offered an adequate response to Complainant's request #4.C. 1-5, 9, 12-15. At no time did I order produced the entire personnel file of each of the 54 employees, as Complainant contends. (Tr. 149; Complainant's Closing Brief, p. 30). Respondent's response was reasonable and adequate, and no negative inference is appropriate.

practice of reinstatement, Williams's declaration fails by not providing specific examples of employees moved to suitable, alternative employment after their security clearance revocation. Thus, I find Mr. Williams's affidavit wholly unpersuasive as evidence of a retaliatory termination.

Beyond Complainant's contention that LMES improperly terminated Complainant under company procedures, Complainant expends considerable energy arguing that numerous jobs at LMES did not require security clearances. (*E.g.,* Complainant's Closing Brief, p. 31-32). Whether or not all jobs at LMES require security clearances is irrelevant. Complainant's argument glosses over the main point: LMES did not desire to employ individuals whose security clearances had been revoked. (Tr 260).

Complainant also advances as circumstantial evidence of retaliatory intent her detainment by armed guards after she was terminated. (Complainant's Rebuttal Brief, p. 29). Complainant called her detention a "public firing ritual." *Id.* The record supports Complainant's version of the facts: she was held for approximately one hour by armed guards in a van with other firearms visible. As circumstantial evidence of retaliation, however, the incident is unpersuasive. First, I grant little weight to the fact that Complainant was detained close to an entry into the facility. While this may have been true, it is equally true that she was detained very close to her own vehicle. Beyond the fortuitous location of her car, I see no other evidence that would support the allegation that the placement of the vehicle with armed guards was intended to humiliate Complainant. Secondly, the time frame of her detention, while admittedly long at approximately one hour, is not so unreasonable as to smack of retaliation. Considering the amount of personal items an average office worker stores in his or her office, the time frame is reasonable, since Ms. Lyles would have had to leave Complainant's termination meeting, proceed to Complainant's office after securing proper boxing and documentation materials, carefully separate personal from professional/business materials, pack the items while documenting her actions, and transport them out to Complainant. This description of the events omits any personal trips Lyles may have required. The record does not support Complainant's contention that it was understood that she only requested three or four personal items from her office. Rather, the record reveals that LMES desired to remove all of Complainant's personal effects on the day she was terminated. Since Ms. Lyles was required to go back to Complainant's office after the Complainant's termination to retrieve additional personal items, it does not appear that LMES was successful in gathering all of Complainant's personal items on the first attempt. However, regardless of Complainant's request, I find no discriminatory intent in LMES's effort to remove all of Complainant's personal items from her office the day she was fired. Accordingly, like the location of Complainant's detention, the length of Complainant's detention is not probative circumstantial evidence of retaliation.

In Complainant's pre-hearing submissions, she alleged blacklisting as an adverse employment action taken against her by LMES. As no proof or testimony has been offered to support this allegation, I shall not address it.

The preponderance of the evidence regarding Complainant's termination clearly demonstrates that Complainant was terminated due to her security clearance revocation. Multiple management witnesses for LMES uniformly testified that Complainant's clearance status, and not her performance, dictated her termination. Furthermore, Complainant's termination was permissible under company policy, and, perhaps more importantly, the company's practice of firing employees with revoked security clearances has been proved by a preponderance of the evidence. I find that LMES's proof of a non-retaliatory motive for Complainant's termination has been so complete that it has been demonstrated by clear and convincing evidence.[3]

Considering the record as a whole, I find absolutely no evidence of discrimination. Complainant provides no connection between her protected activity and the adverse employment actions she suffered beyond her own imagination. Accordingly, Complainant has failed to satisfy her burden under 42 U.S.C. § 5851(b)(3)(C) to demonstrate that her protected activity was a contributing factor in the unfavorable personnel actions she suffered.

VI. CONCLUSION

The evidence of record reveals that 1) Sherrie Farver engaged in protected activity by reporting her safety concerns, and 2) suffered the adverse employment actions of written discipline and termination. The record does not prove by a preponderance of the evidence, however, any nexus between Farver's protected activity and the adverse employment actions she suffered. Accordingly, the complainant has not carried her burden, and her complaint fails.

RECOMMENDED ORDER

Ms. Farver's claim of discrimination under the Energy Reorganization Act, 42 U.S.C. §5851, is denied.

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JOSEPH E. KANE
Administrative Law Judge

[3] Because Complainant's proof falls well short of establishing discrimination by a preponderance of the evidence, the burden of proof never switches to Respondent to demonstrate that it would have terminated Complainant absent the illegal motive. I invoke the "clear and convincing" standard terminology, as contained in 42 U.S.C. §5851(b)(3)(D), simply to highlight the complete paucity of proof of illegal motives.